

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re
MAI VU,
Debtor.

Case No. 99-50321-JRG
Chapter 7

E. LYNN SCHOENMANN, Trustee,
Plaintiff,
vs.

Adversary No. 99-5177

**ORDER DENYING MOTION OF MVA
RESOURCES TO EXPUNGE LIS
PENDENS**

MAI VU, C.S. RESOURCES, INC.,
SUZANNE DECKER, Trustee in
Bankruptcy for C.S.
RESOURCES, INC., WILHAM
ASSOCIATES, LLC, VIET VU,
ALEX MARKOVICH, VU PHAN
PARTNERSHIP, FRANK YU, and
LAI PHAN,
Defendants.

Before the court is the motion of Defendant MVA Resources seeking to expunge a lis pendens recorded by Plaintiff E. Lynn Schoenmann, the Trustee in the case. The court has considered the papers filed by the parties together with the arguments presented at the time of the hearing. The court has also considered the recent case of BGJ Associates, LLC, et al., v.

1 The Superior Court of Los Angeles County, 1999 WL 966760
2 (Cal.App. 2 Dist.)(decided October 21, 1999).

3 The court will not repeat the facts contained in the papers
4 or all of the argument raised at the hearing. At the conclusion
5 of the argument the crux of the question centered on the nature
6 of the Trustee's claim as the Plaintiff in this action. In
7 essence, does the Plaintiff have the type of "real property
8 claim" required to support a lis pendens?

9 Many of the cases argued by movant deal with the ability of
10 a creditor to utilize a constructive trust theory to support a
11 lis pendens. In those cases the court's focus has been on the
12 nature of the lawsuit and whether the Plaintiff was seeking the
13 property itself or, in reality, only monetary damages. Where
14 the courts have found that the real thrust of the action was one
15 for money damages, the lis pendens has been denied.

16 The Plaintiff in this action is the Trustee in Bankruptcy
17 who is not the functional equivalent of a creditor filing a
18 lawsuit to collect a debt. Rather, the Trustee is the statutory
19 representative of the debtor's Bankruptcy Estate in whom all
20 assets of the estate vest in terms of control. In looking at
21 the nature of this action, the Trustee is simply trying to make
22 part of that estate assets which have allegedly been wrongfully
23 concealed under another name.

24 It is true that cases decided by the California court have
25 viewed the applicability of a lis pendens narrowly. This has
26 been due in large part to the court's concern over the potential
27 leverage a lis pendens can create. "It must be borne in mind
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1 that the true purpose of the lis pendens statute is to provide
2 notice of pending litigation and not to make Plaintiffs secured
3 creditors of Defendants nor to provide Plaintiffs with
4 additional leverage for negotiating purposes." BGJ Associates,
5 LLC, et al., Id. citing Urez Corp. v. Superior Court, 190
6 Cal.App.3d at 1149. With respect to any potential settlement,
7 the Trustee is again in a vastly different position. Any
8 settlement by the Trustee must be approved by the court after
9 notice to creditors and other parties in interest. Federal
10 Rules of Bankruptcy Procedure, Rule 9019. For the court to
11 approve a settlement, the court must exercise its independent
12 judgment and find that the proposed settlement is fair and
13 equitable. Protective Committee for Independent Stockholders of
14 TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424, 88 S.Ct
15 1157, 1163, 20 L.Ed.2d 1 (1968); Nellis v. Shugrue, 165 B.R.
16 115, 122 (S.D.N.Y. 1994); In re Woodson, 839 F.2d 610, 620 (9th
17 Cir. 1988); In re A & C Properties, 784 F.2d 1377, 1381 (9th
18 Cir. 1986). Thus, there exists a court supervised settlement
19 procedure which creates a level playing field.

20 Movant claims that the Trustee's complaint does not state a
21 sufficient "real property claim" as required by § 405.31 of the
22 California Code of Civil Procedure. Section 405.31 states that
23 "the court shall order the notice expunged if the court finds
24 that the pleading on which the notice is based does not contain
25 a real property claim." The Comments to § 405.31 add that the
26 "analysis required by this section is analogous to, but more
27 limited than, the analysis undertaken by a court on a demurrer.
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1 Rather than analyzing whether the pleading states any claim at
2 all, as on a general demurrer, the court must undertake the more
3 limited analysis of whether the pleading states a real property
4 claim." Thus, the court must look at the parties' pleadings and
5 decide whether they state a "real property claim." The term
6 "real property claim" is defined in § 405.4 as "the cause or
7 causes of action in a pleading which would, if meritorious,
8 affect (a) title to, or the right to possession of, specific
9 real property or (b) the use of an easement identified in the
10 pleading."

11 Applying this standard to the Trustee's complaint, the court
12 finds that the Trustee's complaint states a real property claim.
13 In contrast to the facts in the cases cited by the Movant, the
14 Trustee does not ask for damages or remedies involving a
15 constructive trust or an equitable lien. Rather, the Trustee
16 seeks "a judgment determining that each of [MVA's] properties
17 are property of the bankruptcy estate." (Trustee's Complaint
18 for Declaratory Relief at 5.) As such, the Trustee has stated a
19 "real property claim" pursuant to § 405.4.

20 Movant also argues that the lis pendens should be expunged
21 pursuant to C.C.P. § 405.32. This provision directs that "the
22 court shall order that the notice be expunged if the court finds
23 that the claimant has not established by a preponderance of the
24 evidence the probable validity of the real property claim."
25 Cases interpreting § 409.1, the predecessor to § 405.32, held
26 that "an examination into the evidence underlying the real
27 property claim, or a 'mini-trial on the merits,' was prohibited
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1 on a motion to expunge a lis pendens." California Lis Pendens
2 Practice, § 3.41 [2d Ed. 1997]. Defendant claims that the
3 "[p]laintiff must prove her good faith in commencing the
4 declaratory relief action, even if the action has just been
5 commenced Plaintiff is not entitled to take discovery in
6 order to show at a later date that she was prosecuting the
7 action in good faith unless Plaintiff can now prove that the
8 action was commenced in good faith and for a proper purpose..."
9 [emphasis in original] (Defendant's Motion to Expunge at 4).

10 Essentially, Defendant's argument is two-fold. First,
11 Defendant argues that the Plaintiff must show that her complaint
12 was filed "in good faith and for a proper purpose." Second,
13 Defendant argues that Plaintiff is not entitled to discovery
14 before she makes the showing of "good faith and proper purpose."
15 Defendant cites two cases for this proposition: Peery v.
16 Superior Court, 29 Cal.3d 837 (1981) and Malcolm v. Superior
17 Court, 29 Cal.3d 518 (1981). However, both of these cases were
18 decided under the old § 409.1, which was superseded by § 405.32.
19 As to the first part of Defendant's argument, Comment 6 to §
20 405.32 states:

21 Former C.C.P. § 409.1(b) required the proponent of a
22 lis pendens to prove that the proponent was proceeding
23 "for a proper purpose and in good faith"; otherwise the
24 lis pendens was to be expunged. This language was
25 construed by the courts to require an inquiry into the
26 proponent's subjective state of mind. See, e.g.,
27 Malcolm v. Superior Court (1981) 29 Cal.3d 518 The
28 provisions regarding proper purpose, good faith and
subjective state of mind are superseded in the new
statute by the new requirement that the claimant
objectively establish the probable validity of the real
property claim.

Thus, the first part of Defendant's argument is not based

1 on current law. As to the second part of Defendant's argument,
2 Comment 3 to § 405.32 states that the section "is intended to
3 disapprove Malcolm v. Superior Court (1981) 29 Cal.3d 518 and
4 other cases which have held that the court on a motion to
5 expunge may not conduct a 'minitrial' on the merits of the case.
6 This section is intended to change California law and to require
7 judicial evaluation of the merits."

8 In addition, § 405.30 provides that "[t]he court may permit
9 evidence to be received in the form of oral testimony, and may
10 make any orders it deems just to provide for discovery by any
11 party affected by a motion to expunge the notice." Contrary to
12 the Defendant's second argument on this point, the court may
13 allow the Plaintiff to conduct discovery prior to the hearing.
14 Under the current § 405.32, a lis pendens must be expunged "if
15 the court finds that the claimant has not established by a
16 preponderance of the evidence the probable validity of the real
17 property claim."

18 The court recognizes the Trustee's assertion that the
19 debtor has failed to produce material documents demanded by the
20 Trustee. The Trustee then argues that due to debtor's non-
21 compliance with discovery requests, Trustee's evidentiary burden
22 should be excused and the motion to expunge the lis pendens
23 should be denied. Based on the current status of the action,
24 the court finds that the Trustee has made a sufficient showing
25 and the motion is denied without prejudice.

26 Finally, movant argues that even if the Plaintiff can
27 establish by a preponderance of the evidence the probable
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1 validity of the real property claim, the Defendant is still
2 entitled to an expungement "through the posting of an
3 undertaking as set forth in Code of Civil Procedure Section
4 405.33. MVA Resources, Inc. is prepared to post a reasonable
5 undertaking in exchange for the expungement of the lis pendens."
6 (Defendant's Motion to Expunge at 5.) C.C.P. § 405.33 provides
7 that:

8 ...the court shall order that the notice be expunged if
9 the court finds that the real property claim has
10 probable validity, but adequate relief can be secured
11 to the claimant by the giving of an undertaking. The
12 expungement order shall be conditioned upon the giving
13 of the undertaking of such nature and in such amount as
14 will indemnify the claimant for all damages proximately
15 resulting from the expungement which the claimant may
16 incur if the claimant prevails upon the real property
17 claim.

18 Additionally, Comment 6 to § 405.33 provides that the
19 moving party (here, the Defendant) has the burden of proof. See
20 also Comment 4 to § 405.30. Moreover, Comment 4 to § 405.30
21 provides that "[u]nless the court can find that an undertaking
22 would secure adequate relief, the motion to expunge must be
23 denied. The moving party must therefore file supporting
24 evidence with the moving papers."

25 However, to date, Defendant has provided no supporting
26 evidence as to why an undertaking would provide adequate relief
27 and what amount of money will indemnify the Plaintiff for all
28 damages proximately resulting from the expungement. Defendant
has merely stated in its Motion to Expunge that "MVA Resources,
Inc. is prepared to post a reasonable undertaking in exchange
for the expungement of the lis pendens." (Motion to Expunge at
5.) Defendant has the burden to demonstrate what amount of

1 undertaking will indemnify the Plaintiff and has failed to meet
2 that burden. As a consequence, this aspect of the motion is
3 denied without prejudice.